



The Federal Election Commission
Washington, DC 20463

JUL 25 2007

Michael Kreloff, Esq.
Attorney at Law
1926 Waukegan Road
Suite 310
Glenview, IL 60025

RE: MUR 5865
New Trier Democratic Organization and
Marvin Miller, in his official capacity as
treasurer

Dear Mr. Kreloff:

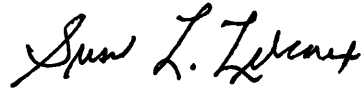
On November 2, 2006, the Federal Election Commission ("Commission") notified your clients, the New Trier Democratic Organization and Marvin Miller, in his official capacity as treasurer ("NTDO" or "Respondents"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On July 16, 2007, the Commission found that, on the basis of the information in the complaint, and information provided by your clients, there is no reason to believe NTDO violated 2 U.S.C. §§ 434(b) and 441a(a). In addition, the Commission voted to dismiss allegations that NTDO violated 2 U.S.C. § 441d, but admonishes the Respondents for failing to include a disclaimer on their flyers stating that they had paid for the flyers and that the flyers were not authorized by any candidate or candidate's committee. NTDO should take steps to ensure compliance with 2 U.S.C. § 441d in the future. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

27044174192

If you have any questions, please contact Ruth Heilizer, the attorney assigned to this matter, at (202) 694-1598.

Sincerely,



Susan L. Lebeaux
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

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RESPONDENTS: New Trier Democratic Organization—Fed and Marvin Miller, in his official capacity as treasurer **MUR: 5865**

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I. INTRODUCTION

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This matter was generated by a complaint filed with the Federal Election Commission by Tolbert Chisum. *See* 2 U.S.C. § 437g(a)(2). The complaint alleges that the New Trier Democratic Organization and Marvin Miller, in his official capacity as treasurer (“NTDO” or “Respondents”), mass-mailed flyers advocating the election of congressional candidate Dan Seals to residents in the Illinois Tenth Congressional District that did not contain a federally compliant disclaimer. The complaint maintains that without the proper disclaimer, it is unclear to readers who paid for the message and whether it was authorized by, or coordinated with, the Seals campaign. Drawing the conclusion that “coordination appears to have occurred,” Complaint at 2, complainant alleges that the flyers constituted an unreported in-kind contribution by NTDO to the Dan Seals for Congress Committee and Harry Pascal, in his official capacity as treasurer (the “Seals Committee”). In its response, NTDO admits that it paid for and authorized the flyers and failed to include the disclaimer required by federal law, but denies that it coordinated the flyers with the Seals Committee. The Seals Committee similarly denies that the flyers were coordinated.

Based on the reasons outlined below, the Commission found no reason to believe that the New Trier Democratic Organization and Marvin Miller, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b) and 441a(a). Although the disclaimer on Respondents’ flyers was deficient, as a matter of prosecutorial discretion, the Commission dismissed the allegation that Respondents violated 2 U.S.C. § 441d with respect to the deficient disclaimer on their flyers, and sent Respondents an admonishment letter.

II. FACTUAL SUMMARY

In 2006, Daniel Seals and Mark Kirk ran for the House of Representatives in Illinois' Tenth Congressional District. In mid-October 2006, prior to the general election, NTDO, the local party committee of the Democratic Party of Illinois and a newly registered federal committee, mailed an unknown number of flyers within New Trier Township expressly advocating the election of Dan Seals and the defeat of Mark Kirk.¹ The flyers characterize the Bush Administration's policies and record in a negative manner and state that "if you support" the Bush Administration and its policies, "then vote for Mark Kirk for U.S. Congress," but "if you've had enough, vote for change . . . vote Democrat Dan Seals for Congress." NTDO's name, postal and electronic mail addresses, and telephone number are printed on the top left-hand side of the first page, along with an invitation to contact it for further information. The flyers, however, omit the requisite printed box with the disclaimer language disclosing who paid for the flyers, and whether the flyers were authorized by any candidate or candidate's committee. See 2 U.S.C. § 441d(a).

The complainant alleges that without a proper disclaimer, "the reader does not know who paid for the message or, critically, whether its message was coordinated or otherwise authorized by Seals." Complaint at 2. The complaint also states that republication of campaign materials (such as the Seals photograph that appears in the flyer) or substantial discussion with a campaign are relevant to a determination of coordination, pursuant to the Commission's coordination regulations. The complaint asserts that "[g]iven that coordination appears to have occurred, [the flyers] would constitute an unreported in-kind contribution," in violation of 2 U.S.C. § 434(b), "and, given the size of the mailing

¹ New Trier Township, which covers approximately 17 square miles, is north of Chicago and includes the villages of Wilmette, Kenilworth, Winnetka, and Glencoe, plus portions of Glenview and Northfield, Illinois. A sworn declaration by NTDO's treasurer states that the Committee mailed the flyers to a "limited number of households" in New Trier Township," but does not provide specific information as to how many flyers were mailed. Miller Declaration at 2.

and the related costs, an impermissible excessive contribution” made by NTDO, in violation of
2 U.S.C. § 441a(a). *Id.* at 2.

The Seals Committee's response states that the Committee had “no involvement” with the
NTDO flyer, and “neither paid for, prepared, discussed, reviewed, nor authorized or approved this
campaign flyer with any party prior to its mailing.” Responding separately, NTDO, by sworn
declaration of its treasurer, Marvin Miller, states that the flyer was “written and designed by NTDO
members without any participation by” Seals’ campaign, and was “paid for solely by NTDO (with
federally eligible dollars) and [was] not authorized by” Seals’ campaign. Declaration of Marvin Miller
at 2, attached to Response of NTDO. Although not stating where it obtained the material for the flyer,
NTDO further avers “[t]he source material . . . was not obtained from” Seals’ campaign. *Id.* NTDO
acknowledges, however, that the disclaimer was not adequate under federal law and should have stated
that the flyers were “[p]aid for by New Trier Democratic Organization and not authorized by any
candidate or candidate’s committee.” NTDO Response at 2; Miller Declaration at 2.

III. ANALYSIS

A. **The Information Presented Does Not Provide a Basis for Investigating Whether the Flyers Constitute Coordinated Communications**

Section 109.37 of the Commission’s regulations provides that a political party committee’s
public communication is coordinated with a candidate, an authorized committee or agent thereof if it
meets a three-part test: (1) payment by a political party committee or its agent; (2) satisfaction of one
of three “content” standards; and (3) satisfaction of one of six “conduct” standards in 11 C.F.R.

1 § 109.21(d)(1) through (d)(6).²

2 In this matter, the first prong of the coordinated communications regulation is satisfied because
3 NTDO, a political committee, acknowledges it paid for the flyer. The second prong of this test, the
4 "content" standard, is also satisfied because the flyer is a public communication that, by urging voters
5 supporting change to "vote Democrat Dan Seals for Congress," expressly advocates the election of
6 Dan Seals, a clearly identified candidate. *See* 11 C.F.R. §§ 100.22 and 109.37(a)(2)(ii).³ Moreover,
7 the flyer was mailed to voters within the candidate's jurisdiction within 90 days before the general
8 election. *See* 11 C.F.R. §§ 109.37(a)(2)(ii) and (a)(2)(iii)(A). However, the information presented is
9 not sufficient to warrant an investigation into whether the "conduct" prong is satisfied. The complaint
10 provides no facts to support its allegation that NTDO coordinated the flyers with the Seals Committee,
11 and relies solely on the lack of a proper disclaimer and the possible republication of the candidate's
12 photograph. In contrast, NTDO has asserted by sworn declaration that it produced the flyers without
13 participation by the Seals campaign, that they were not authorized by that campaign, and that the Seals
14 photograph came from sources other than the campaign. While Respondents did not name those
15 sources, there are copies of the same photograph in numerous places in the public domain. *See, e.g.,*

² Although state and national party committees are permitted to make coordinated expenditures within certain dollar limits, local party committees have no such spending authority of their own. *See* 2 U.S.C. § 441a(d), *see also* 11 C.F.R. §§ 109.32 and 109.33. There is no indication that the national or state Democratic party committees assigned a portion of their expenditure limits to NTDO. In addition, NTDO is not a "subordinate committee" of the state party and, as such, is not authorized to share its expenditure limits. *Id.*; *see also* 11 C.F.R. §§ 100.14(b) and (c). Thus, had NTDO coordinated the flyers in question with the Seals campaign, the cost of the flyers would have constituted an excessive contribution by the former to the latter, as NTDO had already contributed \$5,000 to the Seals Committee during the 2006 general election cycle, the maximum amount permitted. *See* 2 U.S.C. § 441a(a)(1)(C).

³ Based on the disclosed bulk mailing costs of the flyers, it appears that significantly more than 500 flyers were sent, and NTDO has not indicated otherwise. Thus, the flyers constituted "mass mailings," a subset of "public communications." *See* 11 C.F.R. §§ 100.26 and 100.27 (the definition of "public communications" includes, *inter alia*, "mass mailings," a term which is defined as "mailings of more than 500 identical or substantially similar pieces of mail within a 30-day period").

1 <http://www.actblue.com/page/dansealsforcongress.com>.⁴ Likewise, the Seals Committee categorically
2 denied that it had any involvement with the flyers prior to their mailing. We have no information to
3 the contrary.

4 In the past, the Commission has stated that unwarranted legal conclusions from asserted facts,
5 or mere speculation, will not be accepted as true, and “[s]uch speculative charges, especially when
6 accompanied by a direct refutation, do not form an adequate basis to find reason to believe that a
7 violation of FECA has occurred.” Statement of Reasons in MUR 4960 (Hillary Rodham Clinton for
8 U.S. Senate Exploratory Committee, issued December 21, 2000) (citations omitted). Such appears to
9 be the case here.

10 Therefore, based on the foregoing, there is no reason to believe the New Trier Democratic
11 Organization and Marvin Miller, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b) and
12 441a(a).

13 **B. The Flyers Did Not Include the Proper Disclaimer**

14 Under the Federal Election Campaign Act, as amended, whenever a political committee makes
15 a disbursement for the purpose of financing any communication through a mailing, if not authorized by
16 a candidate, or the candidate’s authorized committee or its agents, the disclaimer must clearly state the
17 name, permanent street address, telephone number or World Wide Web address of the person who paid
18 for the communication, and that the communication is not authorized by any candidate or candidate’s
19 committee. See 2 U.S.C. § 441d. Although the NTDO flyer contained its name, telephone number,
20 and postal and electronic mail addresses, NTDO acknowledges that it did not include a statement that
21 NTDO paid for the communication and that it was not authorized by any candidate or candidate’s

⁴ Miller’s sworn Declaration at 2 states that NTDO wrote, designed, and published the flyers itself, using a commercial printer and mailing house. NTDO Response at 2 states that there was no “common vendor,” and the respective committees’ disclosure reports do not indicate otherwise. See 11 C.F.R. §§ 109.21(d)(4) and 109.37(a)(3).

1 committee. *See* 2 U.S.C. § 441d(a)(3). In addition, the disclaimer should have been within a printed
2 box set apart from the rest of the contents of the communication. *See* 2 U.S.C. § 441d(c)(3).⁵

3 Based on a review of NTDO's 2006 Post-General Report, it appears that it cost \$3,405.07 to
4 print and \$4,4405.40 to mail the flyers, for a total of \$7,810.47. As these costs were relatively low, the
5 Commission, in the exercise of its prosecutorial discretion, dismissed the allegation that the New Trier
6 Democratic Organization and Marvin Miller, in his official capacity as treasurer, violated 2 U.S.C.
7 § 441d and sent an admonishment letter.

⁵ NTDO's response stated that the flyers were the first and only communications of their type produced by NTDO during the 2006 federal campaign, and the disclaimer, though inadequate under federal law, was sufficient under Illinois law. NTDO Response at 2, Miller Declaration at 2. According to the Illinois State Board of Elections, political committees making expenditures for political communications directed at voters, which mention political candidates without the candidates' authorization, shall be identified by name within the communication. No other information is required. *See Recent Law and Rule Changes Regarding Disclosures on Political Communications –July 2006* at <http://www.elections.state.il.us/CampaignDisclosure/welcome.aspx>